IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION No.1011 OF 2006

Mr.Laxman Tukaram Jadhav .. ..Petitioner

Versus

The Union of India .. ..Respondents

Mr.M.A.Haindaday for petitioner

Mr.Suresh Kumar for respondents

CORAM : S. C. DHARMADHIKARI, J

DATE : 23RD FEBRUARY, 2006

P.C.:

1. Heard Mr. Haindaday appearing for the Petitioner and Mr. Suresh Kumar appearing for the respondents.

2. The Petitioner challenges by this Petition under Article 227 of the Constitution of India the Order passed by the Estate Officer and Divisional Engineer

(Estate), Western Railway, Mumbai Central dated 12th December, 2003 directing removal of a structure, which according to the respondents is erected on the railway land.

3. The Petitioner challenged this order before the Principal Judge, City Civil Court by instituting Appeal No.1 of 2004 and the said appeal has been dismissed by the impugned Order dated 10th January 2006 for the reason that it is not maintainable.

4. It is the case of the respondents that a show cause notice dated 21.4.2003 issued under Section 5A of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 was served on the Petitioner. The Petitioner received the show cause notice but failed to attend the hearing. On his request time was granted to file his reply, which he had filed eventually on 23.12.2003. Thereafter, the documentary evidence was perused and Estate Officer held that Section 5A is applicable in the facts of this case, that the Petitioner is in unauthorised occupation of the railway land, that he is not entitled for alternate accommodation and therefore, he should be evicted/removed.

5. This order, which was made subject matter of challenge in the appeal but the appeal has been dismissed on the ground that Public Premises Eviction Act does not provide for any appeal to challenge an order under Section 5A thereof.

6. I have heard parties, on the basis that the appeal in the instant matter is not maintainable. The matter has been approached by me from the view point that whether Section 5A at all would apply to the facts of this case.

7. Section 5A of the Public Premises (Eviction of Unauthorised Occupants) Act, reads thus -

> "5A. Power to remove unauthorised constructions, etc.- (1) No person shall -
>
> (a) erect or place or raise any building or (any movable or immovable structure or fixture),
>
> (b) display or spread any goods,

(c) bring or keep any cattle or other animal

on, or against, or in front of, any public premises except in accordance with the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy such premises.

(2) Where any building or other immovable structure or fixture has been erected, placed or raised on any public premises in contravention of the provisions of sub-section (1), the estate officer may serve upon the person erecting such building or other structure or fixture, a notice requiring him either to remove,or to show cause why he shall not remove such building or other structure or fixture from the public premises within such period, not being less than seven days, as he may specify in the notice; and on the omission or refusal of such person either to show cause, or to remove such building or other structure or fixture from the public premises, or where the cause shown is not, in the opinion of the estate officer, sufficient, the estate

officer may, by order, remove or cause to be removed the building or other structure or fixture from the public premises and recover the cost of such removal from the person aforesaid as an arrear of land revenue.

(3) Where any movable structure or fixture has been erected, placed or raised, or any goods have been displayed or spread, or any cattle or other animal has been brought to be kept, on any public premises, in contravention of the provisions of sub-section (1) by any person, the estate officer may, by order, remove or cause to be removed without notice, such structure, fixture, goods, cattle or other animal, as the case may be, from the public premises and recover the cost of such removal from such person as an arrear of land revenue.

A bare perusal of this Section would indicate that in so far as case in hand is concerned, the show cause notice that the petitioner has erected or placed an immovable structure on public premises viz. Wadala Railway Colony, Wadala, which is a railway land. In response to

the show cause notice the reply of the petitioner was very specific and he states that the true facts, according to him, are that he was in use and occupation of two premises one for residence and one for conducting business approximately 40’ x 40". He was conducting business under the name and style of Bhavsai Canteen, Mahatma Gandhi Nagar, Comred Harbansal Marg, Raoli Fly Over Bridge, Mumbai 400 037. At the time of construction of new railway bridge by the respondents, a survey was conducted by their staff and after examining the documents of each of the occupants and their structure, a list was made. The policy is that persons whose name appeared in the list would be permitted to shift their structures at the cost of railway at a distance of about 300 ft. from the original site. The petitioner has annexed a copy of letter permitting him to shift and that is issued on 17.2.1991. The petitioner has indeed shifted and it is this shifted accommodation which is termed as erection of an unauthorised structure on the railway land and sought to be proceeded under Section 5A of the P.P.E. Act.

8. The show cause notice also has been perused by me and the show cause notice states that -

"Whereas I, the undersigned , am of the opinion on the grounds specified below, that the structure/fixture erected on Public Premises mentioned in the Schedule below is in contravention of the provisions of Sub-section (1) of Section 5A, and that the said structure/fixture erected on the said Public premises should be removed from the said Public Premises.

GROUNDS

You have unauthorisedly occupied Railway land at Wadala and constructed a structure thereon without any permission from the Competent Western Railway Authority. This land is now required for the construction and development of the Railway Colony at Wadala.

9. In my view, considering the show cause notice in the backdrop of the letter dated 17th May 1991 it cannot be said that this is a construction/erection which could be brought within the purview of Section 5A of the

P.P.E. Act. In my view, considering the intent and purpose of Section 5A and more particularly in the light of the facts in the present case, the respondents could not have invoked Section 5A of the Act. If the petitioner has erected the structure pursuant to the permission to shift at the present site and it is not the case of the respondents that the structure has been suddenly erected or that there is no permission at all on record to shift, then appropriate course would be to proceed under the same enactment but by resorting to other powers which have been conferred on the respondents thereunder.

10. In this view of the matter, it is not necessary to decide as to whether an appeal would lie to the appellate authority in the facts and circumstances of this case. Since, I have proceeded on the basis that the appeal would not lie but the show cause notice and the order dated 12th December, 2003 being vitiated by an obvious error and non application of mind on the part of the Estate Officer, the same cannot be sustained. The order dated 12th December, 2003 is quashed and set aside.

11. However, this order does not prevent the respondents from initiating such proceedings as are permissible in law including under the P.P.E. Act, 1971 for eviction of the petitioner and needless to state that any observation made in the present order would not prevent the respondents from so proceeding and/or for evicting the petitioner. All contentions in that behalf are kept open.

12. This order is passed because Mr.Haindaday, states that the petitioner is in physical possession of the premises which are sought to be taken away from his use and occupation. The Petitioner shall not create any third party rights or part with possession of the same to enable the respondents to initiate such proceedings. Parties to maintain status-quo for a period of four weeks. Needless to state that the order dated 12th December, 2003 being set aside means that the respondents can proceed to evict the petitioner from the premises which are in his occupation, by due process of law.

(S.C.Dharmadhikari,J.)